

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-63

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STAFFORD CROSSING CONDOMINIUM
ASSOCIATION, INC.,
Plaintiff,

v.

Henderson County
No. 05 CVS 639

STANLEY N. ROBINSON,
ALLEN W. ROBINSON, and
TNCO DEVELOPMENT, INC.,
Defendants.

Appeal by plaintiff from order entered 21 October 2005 by Judge Yvonne Mims Evans in Henderson County Superior Court. Heard in the Court of Appeals 11 December 2006.

Dungan & Associates, P.A., by Robert E. Dungan, for plaintiff-appellant.

David W. Hood for defendant-appellees.

LEVINSON, Judge.

Plaintiff Stafford Crossing Condominium Association, Inc., ("Association") appeals from an order dismissing its negligent construction claim against defendant TNCO Development, Inc., ("TNCO") pursuant to N.C.R. Civ. P. 12(b)(6). Absent any showing that an immediate appeal is necessary to preserve a substantial right of the appellant, we dismiss.

The record reflects that the Association is the unit owners' association for the Stafford Crossing Condominium development ("Stafford Crossing") in Henderson County, North Carolina. See generally N.C. Gen. Stat. §§ 47C-3-101, -102 (2005). TNCO was the developer of Stafford Crossing. On 15 April 2005, the Association filed a three-count complaint in Henderson County Superior Court, naming as defendants TNCO and two of the Association's former directors. In its first claim against TNCO, the Association sought to collect unpaid common expense assessments levied upon the individual condominium units in Stafford Crossing which were owned by TNCO. See N.C. Gen. Stat. § 47C-3-115 (2005). Its second claim asserted the directors had breached their fiduciary duty to the Association during their tenure by failing "to collect past-due assessments, including a prorated insurance fee, plus interest against all unit owners, including . . . TNCO" from June 2002 to June 2004. The Association's third claim sought monetary damages from TNCO for negligent construction of the common areas of the condominium development.

TNCO moved to dismiss the negligent construction claim on grounds that the Association lacked standing and that its claim was barred by the economic loss rule, also known in this state as the *Ports Authority* doctrine. See *Ports Authority v. Roofing Co.*, 294 N.C. 73, 83, 240 S.E.2d 345, 351 (1978) (generally barring negligence claims based upon breach of a construction contract). After a hearing, the trial court dismissed the negligent construction claim "pursuant to Rule 12(b)(6) because of the

application of the economic loss rule and the *Ports Authority* doctrine."¹

On appeal, the Association argues that the trial court erred in dismissing its negligent construction claim under the economic loss doctrine, inasmuch as the Association was not a party to any contract with TNCO for the construction of the condominium development. As the unit owners' association for Stafford Crossing, it asserts both the authority and the duty under Article 3 of the North Carolina Condominium Act to manage and maintain the common areas of the condominium development. See N.C. Gen. Stat. § 47C-3-102(a) (2005). Because it has no claim against TNCO for breach of contract, the Association avers it must seek relief in tort for TNCO's negligent construction of the common areas.

As a general matter, a party has no right to appeal an interlocutory order prior to entry of the final judgment. See *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). An order is interlocutory "if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dep't of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). As the instant order did not dispose of the Association's claim against TNCO for non-payment of assessments or its claim against the directors for breach of

¹The parties resolved the standing issue by stipulating that the negligent construction claim "was limited to damages suffered by the Plaintiff Association as a result of negligent construction of . . . the common elements" of Stafford Crossing.

fiduciary duty, the order is clearly interlocutory. See *Wolfe v. Villines*, 169 N.C. App. 483, 485, 610 S.E.2d 754, 757 (2005).

A party may appeal from an interlocutory order only if (1) the order is final as to one or more claim or party and is certified for immediate appeal by the trial court pursuant to N.C.R. Civ. P. 54(b), or (2) "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (internal quotation marks omitted). Inasmuch as the court did not certify its order for immediate appeal under Rule 54(b), "the order is immediately appealable only if it affects a substantial right." *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 347, 451 S.E.2d 358, 363 (1994). To obtain an immediate appeal, "[t]he burden is on the appellant to show '(1) the [order] affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to him if not corrected before appeal from final judgment.'" *Powell v. Bulluck*, 155 N.C. App. 613, 617, 573 S.E.2d 699, 703 (2002) (quoting *Collins v. Talley*, 135 N.C. App. 758, 760, 522 S.E.2d 794, 796 (1999)).

In its brief to this Court, the Association offers the following argument in favor of an immediate appeal:

The trial court affected the Plaintiff Association's substantial rights by dismissing [its] claim for negligent construction and this dismissal will cause injury to the Plaintiff Association and its members if not reviewed before final judgment.

It cites its statutory mandate to maintain the common elements of

the condominium and to institute litigation for this purpose, G.S. § 47C-3-102, but does not otherwise cite any authority in support of its position. See N.C.R. App. P. 28(b)(6).

We find no grounds for immediate appeal here. Assuming, *arguendo*, that its negligent construction claim was erroneously dismissed, the Association has failed to identify a substantial right that would be threatened without an immediate appeal. Its right to recover monetary damages in tort, if any, can be vindicated on appeal from the final judgment by the reinstatement of the claim. Although “[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order,” *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254, we further discern no risk of inconsistent verdicts if separate trials are held on the Association's claims against TNCO for nonpayment of common expense assessments and for negligent construction. See *Page*, 119 N.C. App. at 735-36, 460 S.E.2d at 335 (“requiring [the appellant] to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists”). Accordingly, we dismiss the appeal.

Dismissed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).